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No. 7

In the Supreme Court of the United States

OCTOBER TERM, 1957

LOUIS JOSEPH ABBATE AND MICHAEL LOUIS FALCONE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

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In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 534

LOUIS JOSEPH ABBATE AND MICHAEL LOUIS FALCONE,

PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the Court of Appeals (Pet. 33) is reported at 247 F. 2d 410.

JURISDICTION

The judgment of the Court of Appeals was entered on August 8, 1957 (Pet. 40) and a petition for rehearing was denied on September 9, 1957 (Pet. 2). The petition for a writ of certiorari was filed on October 8, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

QUESTIONS PRESENTED

1. Whether petitioners could be tried on a federal charge of conspiracy to destroy federally-operated communication systems in violation of 18 U. S. C. 1362 after they had been convicted on a state charge of conspiracy to destroy telephone company property, both charges growing out of the same acts.

2. Whether the evidence established the existence of communication systems operated and controlled by the United States within the meaning of 18 U. S. C. 1362.

3. Whether there was a sufficient showing of knowledge on the part of petitioners that the communications systems they were conspiring to destroy were federally-operated.

4. Whether the evidence was sufficient to establish the participation of petitioners in the conspiracy.

5. Whether it was reversible error to admit evidence of overt acts occurring after petitioners had withdrawn from the conspiracy.

STATUTES INVOLVED

18 U. S. C. 371 provides in pertinent part:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

* * * * *

18 U. S. C. 1362 provides:

> Whoever willfully or maliciously injures or destroys any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States, whether constructed or in process of construction, or willfully or maliciously interferes in any way with the working or use of any such line, or system, or willfully or maliciously obstructs, hinders, or delays the transmission of any communication over any such line, or system, shall be fined not more than $1,000 or imprisoned not more than three years, or both.

STATEMENT

An indictment returned in the United States District Court for the Southern District of Mississippi charged petitioners Abbate and Falcone, and two others, James Shelby and Charles Perry, with conspiring, together with one Norman McLeod (not indicted), to violate 18 U. S. C. 1362 by agreeing willfully and maliciously to injure and destroy, and hinder message transmission over, communication systems operated and controlled by the United States (R. 2). After trial by jury, all of the defendants were convicted (R. 1074). Petitioner Abbate was sentenced to imprisonment for three years (R. 1124–1126), petitioner Falcone for one year (R. 1127–1128), Shelby for three years (R. 1131–1133) and Perry for two years (R. 1129–1131).[1]

[1] In addition, Abbate, Shelby, and Perry were each sentenced to pay fines of $1,000.00.

In a pretrial demand for a separate trial, denied by the court, Shelby and Perry submitted evidence showing that their codefendants Abbate and Falcone, petitioners herein, had been previously convicted in a court of the State of Illinois, upon a plea of guilty, for a conspiracy to destroy communication facilities of named telephone companies, an offense growing out of the same acts as alleged in the federal prosecution (R. 7).

The government's evidence consisted of testimony of Illinois law enforcement officers and officials to whom petitioners had made confessions after their arrest on the state charge, and upon the testimony of McLeod, a co-conspirator who had turned state's evidence, corroborated by testimony of witnesses who had observed and aided the conspirators' movements. This testimony established the following facts:

On April 15, 1955, petitioner Abbate, a resident of Chicago, received a telephone call from an acquaintance who asked if he were interested in making a "fast buck" through a deal involving "Italian confetti", *i. e.*, dynamite (R. 314–315, 738). Abbate expressed interest and agreed to get help from petitioner Falcone, also a Chicago resident, and McLeod, then on parole from the Oklahoma State Penitentiary from a sentence for armed robbery, who was familiar with the use of dynamite (R. 315, 738, 740–741, 24, 47). Arrangement was made by telephone for Abbate to meet a man who would give him details, a man who proved to be James Shelby, an assistant vice pres-

ident of the Communication Workers of America (R. 317). On April 20, 1955, Abbate, with Falcone and McLeod, picked up Shelby from a Chicago street corner, drove around the city for a time, and ended up in a tavern (R. 27–48, 318, 741–743). At this time Shelby spoke of the strike against the Southern Bell Telephone and Telegraph Company, and expressed dissatisfaction with the company's unwillingness to negotiate, saying that it was going to be necessary to "get rough" (R. 38). He told the men that he wanted certain of the company's installations dynamited (R. 40, 742) and gave detailed maps and plans of the installations in three southern states to Abbate (R. 42, 44) designating the places that were to be destroyed (R. 751). At that time, McLeod was introduced to Shelby as the "shooter" (R. 38) and Falcone assumed responsibility for getting the dynamite (R. 45, 46, 48).

The following day Abbate was given five hundred dollars for expenses (R. 47, 752, 760). He gave fifty dollars of this amount to Falcone (R. 752, 760). Abbate, Falcone and McLeod made two unsuccessful attempts to get dynamite (R. 53, 54). Falcone then told McLeod that he could not go south because of business in Chicago (R. 55). Abbate told McLeod that he was not going south because it was too dangerous (R. 56); he suggested to McLeod that they might take the plans and sell them to the telephone company. However, after McLeod "rared up on him," Abbate gave McLeod train fare to Mississippi (R. 57, 752, 761).

McLeod secured dynamite, packed it in three suitcases and left for Mississippi (R. 59–60). In Jackson, Mississippi, he registered at a hotel under an assumed name previously agreed upon by Abbate and Shelby (R. 61, 65, 215–218), and called Charles Perry, the president of the union's local at Jackson, Mississippi (R. 67). He told Perry that Shelby had sent him to do the "shooting" and that the others who were hired had not shown up (R. 68, 71). Perry made arrangements with a girl union member who, posing as McLeod's wife, drove McLeod to varying locations in the area so that he could "spot" company installations, including microwave towers at and near Meridian, Mississippi, which were to be targets (R. 75–80, 646–708). McLeod told Shelby that he felt sure the "other guys" (petitioners here) were going to "double-cross us but I have no proof of it" (R. 81). McLeod received $100 from Shelby (R. 88) and rode with him to see telephone company "huts" which were prospective targets. Before McLeod could do the dynamiting, for which he expected to get $6,000, Shelby told him to go back to Chicago and get the plans from Abbate, giving McLeod $50 for train fare (R. 81–104). Back in Chicago, about April 24th, McLeod called Abbate to get the plans (R. 108). Abbate was very anxious to know what Shelby thought about his failure to come south. He came to see McLeod but did not bring the plans (R. 109).

On April 25th an anonymous telephone caller told the Illinois Bell Telephone Company that he had information he wanted to sell concerning plans of some

persons to destroy property of the Southern Bell Telephone Company (R. 240–241). Since the caller did not want to come in to the company office, a street meeting was arranged for that evening (R. 241). Company investigators arranged to have a Chicago city police officer meet the caller, who turned out to be Abbate (R. 243). Abbate, thinking he was meeting a company representative, told the officer he wanted six thousand dollars for the plans which he had (R. 251). At an appointment arranged by Abbate for the following morning, April 26th, he was arrested (R. 258–259). Chicago police recovered from him copies of the maps and diagrams showing the location of Southern Bell Telephone Company installations which he and Falcone, with the aid of a girl typist, had duplicated from the originals the night before (R. 260, 636–641). Both he and Falcone made admissions at the time to the Illinois authorities (R. 730–765).

Two days after the arrest of Abbate and Falcone, two installations, including a "hut" through which government circuits were amplified, were damaged by explosions (R. 504–508).

The government showed through testimony of an expert witness, an engineer of the Southern Bell Telephone Company, that no less than twenty-one of its circuits or facilities running through two sets of coaxial cable in the area designated by the plans found in Abbate's possession were used solely by agencies of the United States, including the Civil Aeronautics Administration and such military units as the Strategic Air Command and the Navy (R. 357–402). With the

aid of a map, the expert traced these lines through the dynamite target points (R. 364–385), pointing out that the "huts" performed the function of amplifying messages sent through cables (R. 362) and that the microwave towers amplified radio messages (R. 386). The expert testified that many of these circuits were used, operated and completely controlled by the United States twenty-four hours a day (R. 371, 380–382), and that they could not be repaired or otherwise touched by the company without permission of the government (R. 373, 377). It was established that Perry and Shelby had first hand knowledge of these full-time government circuits gained through their association with the telephone company (R. 435–442, 493–498).

On appeal, the Court of Appeals affirmed as to petitioners, but, ruling that evidence of their statements made after arrest by Chicago police was improperly admitted as against the other conspirators then still at large, reversed as to Shelby and Perry (Pet. 39).

ARGUMENT

1. Presumably because of the many decisions by this Court that the federal and state governments are separate sovereigns which may inflict separate punishments for offenses against each sovereign arising out of a single act,[2] petitioners did not enter a plea of double jeopardy before or at the trial based on their prior conviction and three month sentence by the Illinois court. In this Court, however, they call attention to

[2] *Moore* v. *Illinois*, 14 How. 13; *Sexton* v. *California*, 189 U. S. 319; *United States* v. *Lanza*, 260 U. S. 377; *Hebert* v. *Louisiana*, 272 U. S. 312.

the fact that this issue of double jeopardy is presently before this Court for reexamination. *Bartkus* v. *Illinois*, No. 39, this Term, does involve prosecution by different sovereigns for the same act of bank robbery where the only differentiating element of the federal offense is the allegation of the facts necessary for federal jurisdiction. That is also the situation here, although this case is distinguished from *Bartkus* in three respects. First, in *Bartkus*, the plea of double jeopardy was raised before the second trial. Second, *Bartkus* arises in the context of a state trial after a federal trial while this case involves the converse situation, a federal trial after a state trial. Third, in *Bartkus*, the first trial ended in an acquittal rather than, as here, a conviction. Nevertheless, it may be that the decision in *Bartkus* will have a bearing on the problem presented here, since the facts which would support a plea of double jeopardy, which are not disputed, were before the trial court and the case is now pending on direct review of the conviction. Therefore, despite the rule that double jeopardy is a defense which is waived if not timely raised,[3] the Court may wish to defer disposition of this petition until the *Bartkus* case is decided.

2. Petitioners attack the sufficiency of the evidence to establish that there was an interest of the government protected by 18 U. S. C. 1362. Government testimony painstakingly developed that there were

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[3] *Levin* v. *United States*, 5 F. 2d 598 (C. A. 9), certiorari denied, 269 U. S. 562; *Brady* v. *United States*, 24 F. 2d 399 (C. A. 8), certiorari denied, 278 U. S. 603; *McGinley* v. *Hudspeth*, 120 F. 2d 523 (C. A. 10).

"closed government circuits" running through the conspiracy target area (R. 370–402). No less than twenty-one circuits were identified by number and location and specified as being under the control of the Strategic Air Command, the Navy or the Civil Aeronautics Administration. Most were designated by name as "GFP" or "Government Full Period" circuits (R. 375); the government operation and control was said to be in effect twenty-four hours a day. (R. 371, 372, 380). There was testimony that these circuits were "turned over to the Government and marked in such a way that nobody has any right to fool with them at all" and that they could not be repaired by the telephone company without the permission of the government (R. 373, 377, 378, 381), and that in some instances, where the military owned the distribution cables, the government did its own repairs (R. 378). Some of the circuits, designated as "TT" or teletypewriter circuits, were described as engineered military circuits which were held in readiness for a national emergency and which carried messages transmitted by electric machines operated exclusively by the government (R. 381, 382); with respect to those connecting with overseas circuits in Washington, the telephone company had no control whatever (R. 383). Petitioners' argument, which seems to rest on the premise that the telephone company had complete control, is factually unfounded. These circuits were a means of communication operated and controlled by the United States.

Petitioners are apparently contending, in addition, that because these circuits were percentage-wise a

small proportion of the total circuits passing through coaxial cables of the telephone company, they are not a means of communication operated and controlled by the United States within the meaning of the statute. The plain meaning of the statute refutes this contention. The language prohibits the injury or destruction of "any of the works, property, or material of any radio, telegraph, telephone, or cable, line, station, or system, or other means of communication, operated or controlled by the United States * * *". It likewise prohibits the interference "in any way with the working or use of any such line, or system", or the obstruction, hindrance or delaying of "the transmission of any communication over any such line, or system * * *". This broad and inclusive language, with emphasis on operation and control, shows the vital purpose of the legislation to protect government communications, not simply government-owned lines as petitioners contend (Pet. 19). The indictment (R. 3) charged a conspiracy in the words of the statute to destroy property which was an essential and integral part of systems and means of communication operated and controlled by the United States, to interfere with the use and working of communication systems so operated and controlled, and to obstruct the transmission of communications over such systems. The evidence, showing the full-time and exclusive government use of specified communication circuits, was more than sufficient to prove these charges.

3. Petitioners allege that there was insufficient evidence of their knowledge of the existence of the government's communication systems to hold them liable for conspiracy to obstruct the transmission of communications over such systems. Although, admittedly, the evidence showed that co-conspirators Perry and Shelby had knowledge of the government circuits, we do not argue that this knowledge can automatically be imputed to petitioners. It must be shown that the conspiracy which petitioners joined was one to violate a federal law and therefore that interference with the federal system was within the contemplation of the conspiracy. But it is clear that petitioners are chargeable with what was within the "reasonable intendment of the common understanding" at the time they joined the conspiracy. *United States* v. *Crimmins*, 123 F. 2d 271, 273 (C. A. 2). Here the express agreement contemplated the destruction of communication systems covering three states. Where destruction having such widespread effect is intended, interference with federal communications should be regarded as a natural consequence which must follow from such destruction. See *United States* v. *Anderson*, 101 F. 2d 325 (C. A. 7), certiorari denied, 307 U. S. 625; *Williams* v. *United States*, 295 Fed. 302 (C. A. 5);[4] see also, *Pereira* v. *United States*, 347 U. S. 1, and *Clark* v. *United States*, 213 F. 2d 63 (C. A. 5). Petitioners, we think, agreeing to destroy such communications facilities, in

[4] In these cases defendants who were shown to have conspired to cripple railroad transportation were presumed to have intended consequences of their acts which in *Anderson* obstructed passage of mail and, in *Williams*, restrained interstate commerce.

reckless disregard of who might control or operate them, must under these circumstances be held to have embraced a conspiracy which contemplated the natural consequences of such action—the obstruction of government communications.

4. Petitioners contend further that they never intended to enter the conspiracy and that they withdrew before an overt act was committed in its furtherance. The facts clearly show this contention to be without merit.

Petitioner Abbate was a keyman in the formation of the conspiracy. It was he who contacted petitioner Falcone and McLeod (R. 740–741) and brought them together with Shelby (R. 741–742). It was he who did most of the talking (R. 39), and who received the money for expenses connected with the planned destruction (R. 752). Petitioner Falcone received fifty dollars of this expense money (R. 760) and agreed to get the dynamite (R. 45). A conspiracy existed and overt acts in furtherance thereof had been committed at this point. Moreover there was no showing of withdrawal at that time. While petitioners refused to go south, Abbate gave McLeod the money to go south, sending him on his criminal mission (R. 56). At this time certainly the conspiracy was still existing as to petitioners. See *United States* v. *Britton,* 108 U. S. 199; *United States* v. *Beck,* 118 F. 2d 178 (C. A. 7), certiorari denied, 313 U. S. 587; *Eldredge* v. *United States,* 62 F. 2d 449 (C. A. 10). Abbate did not in fact arrange his surreptitious contact with the telephone company until April 25th after McLeod had re-

turned from the south. And up until this time at least there had been no affirmative or effective act which could constitute a withdrawal. *Hyde* v. *United States*, 225 U. S. 347; *Eldredge* v. *United States, supra*; *United States* v. *Compagna*, 146 F. 2d 524 (C. A. 2), certiorari denied, 324 U. S. 867.

5. Petitioners contend that the trial court committed prejudicial error in admitting into evidence testimony concerning actual dynamiting, occurring on April 28, 1955, which damaged or destroyed facilities included in conspiratorial plans. Such testimony was clearly admissible against Shelby and Perry, not only to indicate the nature of the conspiracy, but for the reason that they were still at large and presumably acting pursuant to the conspiracy. We assume that petitioners, having made disclosures and having been jailed two days earlier, could not have been directly responsible for the destruction. Nevertheless we believe such evidence to have been admissible against them to show the nature of the original conspiracy which they joined. See *Lutwak* v. *United States*, 344 U. S. 604. Moreover, even assuming the evidence to be improper, its admission would have been harmless error under the circumstances here. The jury could not have been misled. The evidence was clear that petitioners were in jail at the time of the bombings. The charge of the court indicated that they were at this time "out of the conspiracy".[5] It was the detailed testimony recount-

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[5] Thus the charge reads in part (R. 1049–1050):
"Now, you have evidence here tending to show that while this thing happened in Chicago, in which the officers arrested Abbate

ing petitioners' admissions, corroborated by the testimony of McLeod and others, which provided overwhelming proof of their guilt.

Respectfully submitted.

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and afterwards arrested Falcone, that it happened before the dynamiting down here. * * *

"Now, as to these two men, when they were arrested by the officers and were placed in prison, they no longer had any power to commit acts or to do things that might bind the others and for that reason, while I had some question in my mind at first, a careful examination of the law has convinced me that I should charge you that insofar as their statements to the police officers up there are concerned, and to the extent that they may involve anybody else, it is not to be considered against the other person. In other words, it can be considered against them alone and it can, even though they were out of the conspiracy, that evidence is admissible against them for the purpose of proving that they were parties to the conspiracy. In other words, they can make admissions insofar as they are concerned and it is receivable in evidence to be received along with all the other evidence to determine whether they were parties to the conspiracy."

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